

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
DEC 3 - 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
CHIBARDUN TELEPHONE COOPERATIVE, INC.)	CC Docket No. 97-219
CTC TELCOM, INC.)	
)	
Petition for Preemption Pursuant to Section 253 of the)	
Communications Act of Discriminatory Ordinances, Fees)	
and Right-of-Way Practices of the City of Rice Lake,)	
Wisconsin)	

COMMENTS OF AT&T CORP.

Pursuant to the Commission's Order, DA 97-2400, released November 17, 1997, AT&T Corp. ("AT&T") submits the following comments on the petition by Chibardun Telephone Cooperative, Inc. and CTC Telcom, Inc. (collectively "Chibardun") for preemption of local entry barriers pursuant to Section 253(d) of the Telecommunications Act of 1996 (the "1996 Act"), 47 U.S.C. § 253(d).

Chibardun's petition asserts that the city of Rice Lake, Wisconsin ("the City") has prevented Chibardun from providing telecommunications services by its refusal to grant Chibardun excavation permits necessary for Chibardun to construct telecommunications facilities.¹ Such action by the City is foreclosed by the plain language of the 1996 Act which, by its terms, preempts state and local government barriers to local services competition. 47 U.S.C. § 253(a). Moreover, the City's refusal to grant such

For AT&T

OJS

permits unless and until Chibardun executes a License Agreement does not come within the right-of-way management functions permitted by Section 253(c) of the Act because the proposed License Agreement is not "competitively neutral" nor "nondiscriminatory" as required by that section. The Commission therefore should confirm that the City may not use its authority over the public rights-of-way to prevent Chibardun from providing telecommunications services through denial of essential excavation permits.

ARGUMENT

Section 253(a) of the 1996 Act outlaws all state and local government barriers to entry in the provision of local telephone services:

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

According to Chibardun's petition, the City has done precisely what Section 253(a) of the 1996 Act forbids – prohibited an entity from providing an intrastate telecommunications service – by its refusal to grant Chibardun necessary excavation permits. As a result, Chibardun alleges that it has missed the 1997 construction season and therefore has been barred from providing telecommunications services to the City's residents until at least late 1998. Pet., at 4. This use by the City of its authority over public rights-of-way to prevent competition is precisely the type of local government action that Congress prohibited through enactment of Section 253(a). The Commission should confirm that such action by the City is preempted by the 1996 Act.

¹ Solely for purposes of these comments, AT&T accepts as true the allegations of Chibardun's Petition. These comments are limited to the legal issues raised by those allegations.

Because the City has violated Section 253(a) by barring Chibardun's provision of local telecommunications service, the Commission must preempt such action by the City unless it constitutes an exercise of the City's right-of-way authority permitted under Section 253(c). However, the City's denial of excavation permits to Chibardun unless Chibardun executes the City's proposed License Agreement does not meet the criteria of Section 253(c), because the License Agreement does not provide for "competitively neutral," "nondiscriminatory" right-of-way management, as required by that section. Instead, as Chibardun alleges, the License Agreement would impose significant obligations on a new entrant – Chibardun – that are not borne by the incumbent local exchange carrier, GTE.

In the first instance, the City's requirement that Chibardun alone execute the License Agreement as a pre-condition to receipt of the necessary excavation permits is discriminatory. GTE has routinely received such permits on a few days notice. Indeed, Chibardun alleges that, in some instances, GTE has received the necessary permit authorization after it has commenced excavation. Pet., at 7-8. This non-competitively neutral requirement already has served to insulate GTE from local services competition. Instead of being able to complete construction in order to provide service in late 1997, Chibardun's installation of telecommunications facilities has been delayed to some time in 1998 at the earliest. Id., at 18.

Moreover, the terms of the License Agreement – which would apply to Chibardun alone – are discriminatory. For example, as a pre-condition to receipt of the excavation permits, Chibardun would be required to pay an administrative fee of \$10,000 for the drafting and processing of the License Agreement versus the simple \$10 permit fee

required of GTE. Further, Chibardun, unlike GTE, would be required to agree in advance to comply with the terms of the City's proposed telecommunications ordinance (including any right-of-way occupancy fee provisions), and thus presumably to waive its right to object to any unlawful or preempted provisions in that future ordinance. See ¶ 15 of the License Agreement, Exhibit E to the Petition. The License Agreement also would require Chibardun to provide pole, conduit and other facilities to the City at no charge, an obligation that GTE does not have. In addition, the License Agreement would impose significantly more burdensome indemnification and insurance obligations on Chibardun than those currently imposed on GTE. Pet., at 22-23.²

As the Commission recently made clear:

[W]hen a local government chooses to exercise its authority to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, it must do so on a competitively neutral and non discriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.

TCI Cablevision of Oakland County, Memorandum Opinion and Order, CSR-4790, FCC 97-331 (Sept. 15, 1997) ¶ 108 (footnotes omitted). Here, the City has constructed obstacles to the provision of local exchange service that apply only to new entrants. These barriers already have barred facilities-based local competition and will continue to do so unless preempted by the Commission. The Commission therefore should confirm

² Similarly, Ordinance No. 849, the interim ordinance adopted by the City, treats new entrants in a discriminatory manner. Thus, this ordinance requires the City's consent for significant new construction or installation of facilities (which Chibardun seeks to do), but permits the incumbent LEC to dig up the City's streets to perform "repair and maintenance" work without any such consent. See Ordinance No. 849, §§ 2,3, (Ex. G to the Petition).

-5-

that such non-competitively neutral and discriminatory regulation of the City's rights-of-way is preempted.

CONCLUSION

For the foregoing reasons, the Commission should grant Chibardun's petition and confirm that the 1996 Act preempts the discriminatory denial of necessary excavation permits by the City.

Respectfully submitted,

AT&T CORP.

By Stephen C. Garavito

Mark C. Rosenblum
Stephen C. Garavito
Its Attorneys

295 N. Maple Avenue
Room 3252G1
Basking Ridge, NJ 07920
(908) 221-8100

Dated: December 3, 1997

CERTIFICATE OF SERVICE

I, Helen Elia, do hereby certify that on this 3rd day of December, 1997, a copy of the foregoing "Comments of AT&T Corp" was mailed by U.S. first class mail, postage prepaid, upon the party listed below:

Gerard J. Duffy
Blooston, Mordkofsky, Jackson & Dickens
2120 L Street, NW
Washington, DC 20037
Attorneys for Chibardun Telephone Cooperative, Inc.
CTC Telcom, Inc.


Helen Elia